United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, December 06, 2016 **Hearing Room 5B**

10:30 AM
8:16-13124 Julie Jean Thomas **Chapter 13**

#1.00 Motion for relief from the automatic stay PERSONAL PROPERTY

TD AUTO FINANCE LLC
Vs.
DEBTOR

Docket 17

Tentative Ruling:

Grant. Appearance optional.

Party Information

Debtor(s):

Julie Jean Thomas — Represented By Michael Jones

Trustee(s):

Amrane (SA) Cohen (TR) — Pro Se

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, December 06, 2016 **Hearing Room 5B**

10:30 AM

8:15-13438 Salvador Manuel Robledo **Chapter 13**

#2.00 Motion for relief from the automatic stay REAL PROPERTY
(cont'd from 11-01-16)

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION
Vs.
DEBTOR

Docket 52

***** VACATED *** REASON: OFF CALENDAR - NOTICE OF VOLUNTARY DISMISSAL OF JP MORGAN CHASE BANK'S MOTION FOR RELIEF FROM AUTOMATIC STAY FILED 11-23-16**

Tentative Ruling:

Grant. Appearance is optional.

Party Information

Debtor(s):

Salvador Manuel Robledo	Represented By Joshua L Sternberg

Movant(s):

JPMorgan Chase Bank, National	Represented By Christina J O

Trustee(s):

Amrane (SA) Cohen (TR)	Pro Se

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, December 06, 2016 **Hearing Room 5B**

10:30 AM

8:16-14659 Daniel W Fox and Kieta Fox **Chapter 13**

#3.00 Motion in Individual Case for Order Imposing a Stay or Continuing the Automatic Stay as the Court Deems Appropriate.

Docket 10

Tentative Ruling:

Grant. Appearance optional.

Party Information

Debtor(s):

Daniel W Fox	Represented By Dennis Connelly

Joint Debtor(s):

Kieta Fox	Represented By Dennis Connelly

Movant(s):

Kieta Fox	Represented By Dennis Connelly
Daniel W Fox	Represented By Dennis Connelly

Trustee(s):

Amrane (SA) Cohen (TR)	Pro Se

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, December 06, 2016 **Hearing Room 5B**

11:00 AM

8:11-22793 Maria G Rivera **Chapter 7**

#4.00 STATUS CONFERENCE RE: Chapter 7 Case.
(Cont'd from 10-11-16)

Docket 0

***** VACATED *** REASON: CONTINUED TO 2-28-2017 AT 11:00 A.M. PER ORDER APPROVING STIPULATION TO CONTINUE STATUS CONFERENCE AND BRIEFING DEADLINES ENTERED 11-07-16**

Tentative Ruling:

So, what needs to be done in this case, if anything?

Party Information

Debtor(s):

Maria G Rivera — Represented By Caroline Djang

Trustee(s):

Thomas H Casey (TR) — Pro Se

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, December 06, 2016 **Hearing Room 5B**

11:00 AM

8:15-13008 Anna's Linens, Inc. **Chapter 11**

#5.00 Motion to Allow Claim Under 503(b)(9) and Payment of Administrative Expense Claim Of Ivie & Associates, Inc

(cont'd from 10-11-16 per order approving stipulation to continue hrg on motion of Ivie & Associates, Inc entered 10-5-16)

Docket 1051

***** VACATED *** REASON: CONTINUED TO FEBRUARY 28, 2016 AT 11:00 A.M. PER ORDER APPROVING STIPULATION TO CONTINUE HEARING ENTERED 12/5/2016**

Tentative Ruling:

Tentative for 6/28/16:
Continued to August 9, 2016 at 11:00 a.m. per Stip to Continue filed on June 27, 2016.

Party Information

Debtor(s):

Anna's Linens, Inc.

Represented By
David B Golubchik
Lindsey L Smith
Eve H Karasik
John-Patrick M Fritz
Todd M Arnold
Ian Landsberg
Juliet Y Oh

Movant(s):

Ivie & Associates, Inc.

Represented By
Gary B Elmer

11:00 AM
8:15-13008 Anna's Linens, Inc. **Chapter 7**

#6.00 Trustee's Application to Employ Brutzkus Gubner as Joint Special Co-Litigation Counsel Nunc Pro Tunc to September 19, 2016

Docket 1615

Tentative Ruling:

This is Trustee Karen Naylor's ("Trustee") application to employ Brutzkus Gubner Rozansky Seror Weber LLP ("Brutzkus Gubner") as special litigation counsel to jointly represent Trustee along with Trustee's general counsel Ringstad & Sanders LLP ("Ringstad & Sanders") in adversary proceeding 8:15-ap-01482, titled *P&A Marketing, Inc., et al. v. Anna's Linens, Inc. et al.* ("Adversary Proceeding"). Brutzkus Gubner will be employed on a contingency fee basis based on the percentage of recovery related to claims asserted in the Adversary Proceeding. The application is hotly contested. It also represents a pushing of the envelope in such matters to an extraordinary degree. Normally, the court trusts the business judgment of the trustee in such matters, so long as the outer boundaries imposed by the Code are respected. But the question for the court is whether this application goes too far. To gain some perspective, a brief history and synopsis are helpful.

A. Facts

Debtor Anna's Linen's, Inc. ("Debtor") filed a voluntary chapter 11 petition on June 14, 2015. On September 18, 2015, the Official Committee of Unsecured Creditors ("Committee") and the lenders named as defendants in the Adversary Proceeding ("Lender Defendants") entered into a Tolling Agreement regarding certain claims the Committee may assert against the Defendants. At the time, the Tolling Agreement contemplated the appointment of a Chapter 7 Trustee. After this case was converted to Chapter 7, Trustee was substituted in as a party in interest to the Tolling Agreement, agreeing with the Lender Defendants that the Estate's rights to assert these claims would expire on October 3, 2016 at 11:59 pm, unless the parties entered into another agreement.

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CONT... Anna's Linens, Inc. **Chapter 7**

On December 30, 2015, Panda Home Fashions LLC, Shewak Lajwanti Home Fashions, Inc., and Welcome Industrial Corporation (collectively "Vendor Plaintiffs") filed a complaint initiating the Adversary Proceeding on behalf of P&A Marketing, Inc. The complaint alleged the following claims: (1) fraud; (2) negligent misrepresentation; (3) breach of the implied covenant of good faith and fair dealing; (4) breach of fiduciary duty; (5) aiding and abetting fraud; (6) aiding and abetting breach of fiduciary duty; (7) breach of fiduciary duty; (8) unjust enrichment; and (9) equitable subordination. The Vendor Plaintiffs filed their First Amended Complaint on January 15, 2016. Nine causes of action are asserted in the First Amended Complaint. Five of these causes of action are claims belonging to the Vendor Plaintiffs. These claims are: (1) fraud; (2) negligent misrepresentation; (3) breach of implied covenant of good faith and fair dealing; (4) aiding and abetting fraud; and (5) unjust enrichment. Three of these causes of action are derivative claims belonging to the Estate. These claims are: (6) breach of fiduciary duty; (7) aiding and abetting breach of fiduciary duty, and (8) breach of fiduciary duty. Vendor Plaintiffs and the Estate share one claim as described in the Tolling Agreement: equitable subordination (Trustee's Reply however later states that they share two claims).

On March 2, 2016, Vendor Plaintiffs filed a Motion to Compel Return of Attorneys' Fees and Costs Paid to Defendant Lenders' Counsel, Docket No. 1382 ("Disgorgement Motion"). The Vendor Plaintiffs filed a Reply in further support of the Disgorgement Motion on March 16, 2016, and Defendant Lenders filed an Objection to the Disgorgement Motion on March 25, 2016. On April 5, 2016, Vendor Plaintiffs filed a Supplemental Reply in Support of the Disgorgement Motion and on April 22, 2016, the Trustee filed a Statement of Position on the Disgorgement Motion. The court held a hearing on the Disgorgement Motion on April 27, 2016, with the matter continued to September 27, 2016. Before the continued hearing, the Vendor Plaintiffs and Defendant Lenders entered into a Stipulation resolving certain issues in the Disgorgement Motion. This Stipulation was approved by the court, with an order entered on September 8, 2016. Currently, a continued hearing on the Disgorgement

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CONT... Anna's Linens, Inc. **Chapter 7**

Motion is scheduled for December 13, 2016.

Prior to the conversion, Brutzkus Gubner absorbed all costs of litigating the Adversary Proceeding and Disgorgement Motion on behalf of Vendor Plaintiffs. Consequently, Vendor Plaintiff and Brutzkus Gubner entered into an agreement whereby Brutzkus Guber would represent them on a contingency basis. If there is no recovery, Vendor Plaintiffs are to pay for costs and other expenses up to a maximum of $90,000 ("Vendor Costs Advance"). In addition, Brutzkus Gubner is representing the Vendor Plaintiffs in other matters "including both in pursuing the Vendor Plaintiff's respective administrative claims and general unsecured claims against the Estate, and in defending the Vendor Plaintiffs…against any actions…brought on behalf of Estate." (these actions referred to collectively as "Other Matters") Motion at 5, lines 12-15.

A series of motions to dismiss have also been filed, with the motions to dismiss initially scheduled for hearing on May 26, 2016. The parties have agreed to hold these motions in abeyance until Trustee has conducted due diligence regarding the merits of the claims. In addition, the parties have agreed for Brutzkus Gubner to represent Trustee and Vendor Plaintiffs, and for these parties to file a further amended complaint. This amended complaint was due October 3, 2016.

B. Joint Prosecution Agreement

On September 19, 2016, Vendor Plaintiffs and Trustee (collectively, "Plaintiffs") entered into a Joint Prosecution Agreement. The remainder of the motion focuses on the key terms of this Agreement, which are summarized in salient part as follows:

- Plaintiffs will file a second amended complaint in the Adversary Proceeding adding Trustee as Plaintiff and removing Debtor as Defendant, as well as amending any of the claims as necessary. Plaintiffs will also remove their cause of action against Debtor for breach of the implied covenant of good faith and fair dealing without prejudice.

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CONT... Anna's Linens, Inc. **Chapter 7**

- The entire amount of the gross recovery received in the Adversary Proceeding will be counted in determining the Trustee's compensation under 11 U.S.C. § 326(a)

- Trustee will retain Brutzkus Gubner as special co-litigation counsel to represent Trustee and Vendor Plaintiffs in the Adversary Proceeding, with Brutzkus Gubner to work with Trustee's general counsel Ringstad & Sanders. Brutzkus Gubner will also represent Vendor Plaintiffs in the Adversary Proceeding and Other Matters, but will not represent Trustee in the Other Matters. In the event of a conflict of interest or disagreement regarding litigation strategies or settlement, Brutzkus Gubner will only represent Vendor Plaintiffs, and Ringstad & Sanders will only represent Trustee.

- Trustee will provide Brutzkus Gubner with a retainer of $30,000 ("Trustee Cost Advance") which will supplement the Vendor Costs Advance of $90,000. Apparently, the Trustee proposes to write a check from estate funds for this Costs Advance. Brutzkus Gubner has also agreed to advance the costs for prosecuting the claims to the extent such costs exceed the above described advances.

- Brutzkus Gubner shall be paid its fees on a contingency fee basis. Motion at 9-10 describes the percentages Brutzkus Gubner will be paid based on the Gross Recovery.

Trustee argues that Brutzkus Gubner should be employed because of its experience in bankruptcy practice and its familiarity with the particulars of this ongoing litigation. In addition, Trustee mentions that Brutzkus Gubner has "carefully reviewed its files and determined that no conflict exists in connection with this matter other than as described above." Motion at 11, lines 20-22. The Trustee acknowledges some potential conflicts, but urges that these issues can be readily resolved and that Ringstad Sanders would take over in the event such real conflict develops.

C. Opposition

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CONT... Anna's Linens, Inc. **Chapter 7**

This matter is hotly contested. Objections to Trustee's motion have been filed by Baltic Linen Company, Inc. and Salus Capital Partners, LLC. One would expect an opposition from Salus, who is after all the target defendant. But that another creditor, Baltic, with no apparent direct interest in the litigation, has taken the time and expense to file papers is emblematic of the complexity and level of concern.

Baltic raises nine issues with the Joint Prosecution Agreement. These concerns are as follows:

1. Trustee Handle

The Joint Prosecution Agreement provides that the entire amount of the Gross Recovery received through the Adversary Proceeding should be counted for determining Trustee's compensation under 11 U.S.C. § 326(a). Baltic argues this is not appropriate because the estate is only entitled to 50% of the Gross Recovery under the Joint Prosecution Agreement. Baltic urges that the actual amount the estate receives should determine Trustee's compensation.

2. Duplication of Services and Conflicts Issues

Baltic argues that "[i]t appears that other than a [sic] equitable subordination claim by both Plaintiffs only 1 Cause of Action is joint." Baltic Opposition at 3, lines 15-16. Thus, Baltic argues that it would make more sense for the Trustee and the Vendor Plaintiffs to prosecute their own separate adversary proceedings. Baltic also argues that using Ringstad & Sanders as conflicts counsel simply has the effect of Ringstad & Sanders having to review and duplicate Brutzkus Gubner's work. In short, this arrangement is more costly, not less and so the estate should not be responsible for needless expense.

3. Actual Conflict of Interest

The Joint Prosecution Agreement provides that Brutzkus Gubner will represent the Vendor Plaintiffs in the Adversary Proceeding alone, as well as jointly represent the Estate as co-special litigation counsel. If a conflict of interest arises, then

Brutzkus Gubner will only represent Vendor Plaintiffs, and Trustee's counsel Ringstad & Sanders will only represent Trustee. Baltic warns that Brutzkus Gubner could favor Vendor Plaintiff's cause of action, wait 6 months to receive a fee, then "opt out on behalf of the Vendor Plaintiffs on any settlement, thus enabling the Vendor Plaintiffs to make a very significant recovery …leaving the bankruptcy estate and its creditors little." Baltic Opposition at 4, lines 8-10.

4. Settlement Conflict and Allocation Problems

If a disagreement should develop regarding strategies in prosecuting the Adversary Proceeding, the Adversary Proceeding "becomes essentially bifurcated," as Brutzkus Gubner will solely represent Vendor Plaintiffs and Ringstad & Sanders will solely represent Trustee. Baltic Opposition at 4, line 20. This is urged as problematic and not well explained.

5. Settlement Split and Drop Dead Date Are Unfair to Creditors

The Joint Prosecution Agreement provides that if Trustee proceeds with a settlement of the estate's claim six months after approval of the employment application/motion, and Vendor Plaintiffs decide to proceed with prosecuting their claims six months after approval of the employment application/motion, Brutzkus Gubner will receive its entire contingent fee. Baltic argues that this provision is unfair, as Brutzkus Gubner will be incentivized to continue prosecution of Vendor Plaintiffs' claims. If this occurs, then the estate essentially is double charged for both Trustee's fees and Brutzkus Gubner's fees. In short, Baltic argues that this creates a conflict of interest between Trustee and Vendor Plaintiffs.

6. Payments to Professionals

Baltic contends that the waterfall distribution in the Joint Prosecution Agreement is detrimental to creditors. According to Baltic, the effect of the distribution favor Brutzkus Gubner, as they will receive a "total of 65% of the Gross

Recovery for professional fees" compared to creditors who will receive "17.5% of the Gross Recovery…" Baltic Opposition at 5, line 25 to 6, line 1.

7. Amount of Claims of Vendor Plaintiffs Should Be Determined Prior to Approval of the Application as They Possibly Can Receive the Full Value of Their Claims

The Joint Prosecution Agreement provides that Vendor Plaintiffs will not receive more than the amount they claim; however, the amount they claim is not discussed. Baltic is concerned that Vendor Plaintiffs will receive more than the amount they are entitled to, as the Adversary Proceeding references "amounts on unpaid invoice… [and] merchandise in factories…" Baltic Opposition at 6, lines 12-13. Baltic seems to suggest that allowance of the claims in fixed amount should logically precede the litigation and application of any formula.

8. Contingency Fee Payments to Brutzkus Guber by Vendor Plaintiffs

Baltic argues that while it is unclear, it appears that Brutzkus Gubner will receive double fees: a "waterfall contingency fee of 40% of the Gross Recovery from the bankruptcy estate and…[a] contingency fee from the Vendor Plaintiffs from the 50% recovery they receive." If Brutzkus Gubner does in fact receive double fees, this is a richer fee than the court should permit.

9. Gross Recovery Should Include Reimbursement of Costs

As argued above, Baltic asserts that Brutzkus Gubner can manipulate its payment of fees by not settling should Trustee reach a settlement. This creates a conflict of interest for the other creditors of the estate.

Baltic next argues that Brutzkus Gubner should not be employed, as employment would violate 11 U.S.C. § 327. First, Baltic contends that Brutzkus Gubner is not disinterested, as they have represented an interest adverse to the estate. Baltic contends that courts have held that an adverse interest includes "any interest or relationship, however slight, ‘that would even faintly color the independence and

impartial attitude required by the Code and Bankruptcy Rules.' *In re Roberts*, 46 B.R. 815, 828-29 (Bankr. N.Ga.1985) citing *In re Sambo's Restaurants,Inc*. 20 B.R.295, 297(Bankr. C.D.Cal. 1982). Thus, because Brutzkus Gubner would represent Vendor Plaintiffs and Trustee here, but also solely Vendor Plaintiffs on different claims, Brutzkus Gubner has divided loyalty and cannot be employed by Trustee. Moreover, because Brutzkus Gubner has already represented Vendor Plaintiffs during the pendency of Debtors bankruptcy case, and has taken actions against the interests of the estate, an actual conflict of interest exists.

According to Baltic, *nun pro tunc* employment is only warranted in exceptional circumstances, requiring the applicant to "(1) give a satisfactory explanation for the failure to obtain pre-employment approval; and (2) show that its services conferred a significant benefit on the bankruptcy estate." Baltic Opposition at 16, lines 5-6, citing *In re Atkins*, 69 F.3d 970 (9th Cir. 1995). Finally, Baltic concludes by arguing that Brutzkus Gubner is biased in favor of Vendor Plaintiffs in such a way that self-policing does little to alleviate concern. Moreover, Baltic argues that Vendor Plaintiffs hold substantial claims in the Adversary Proceeding, and that there will most likely be a "battle for each parties respective share." Baltic Opposition at 16, line 25. Baltic cites *In re Project Orange Associates, LLC*, 431 B.R. 363 (Bankr. S.D.N.Y. 2010), where a New York bankruptcy court determined that proposed conflicts counsel could not resolve the conflicts at hand because they were central to the debtor's reorganization.

Salus makes most of the same arguments as Baltic. But Salus also discusses the Conflicts Waiver, highlighting how both Brutzkus Gubner and Ringstad & Sanders state that they do not presently see "actual or reasonably foreseeable adverse effects…", but that if confidential information relating to the Adversary Proceeding is inadvertently disclosed, it will not be used by Trustee or Vendor Plaintiffs in the other matters. Salus Opposition at 6, lines 18-19. Just how that will be managed is not adequately explained, and in Salus' view, that is fatal.

Salus argues that Brutzkus Gubner is not disinterested, as Brutzkus Gubner is representing Vendor Plaintiffs "in connection with prosecuting the Proofs of Claim

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CONT... Anna's Linens, Inc. **Chapter 7**

and in pursuit of damages against the Estate for alleged breaches of the covenant of good faith and fair dealing..." Salus Opposition at 7, lines 21-22. In addition, Brutzkus Gubner is also disqualified because it would represent Vendor Plaintiffs in any preference claim action brought against Vendor Plaintiffs by Trustee. Further, Trustee's preference claims against Vendor Plaintiffs are significant both in their amount (totaling approximately $9 million) and also because the source of the preference payments was likely the Lender Defendants. Because Brutzkus Gubner represents Vendor Plaintiffs in these matters against Debtor, Brutzkus Gubner is not disinterested and Vendor Plaintiffs hold an adverse interest. In addition, Salus points to the plain language of 11 U.S.C. § 327, which states that "unless there is an objection by another creditor or the United States Trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest." Again, because Brutzkus Gubner represents Vendor Plaintiffs in their actions against Debtor, and because Debtor has preference claims against Vendor Plaintiffs, an actual conflict exists. Therefore, the court should not approve of the employment proposed by Trustee. Moreover, Salus points out that there is also an actual conflict of interest "as to the recovery of distribution of proceeds." Salus Opposition at 10, lines 16-17. In the Adversary Proceeding, Vendor Plaintiffs are seeking subordination of Lender Defendant's claims. In other words, Brutzkus Gubner, while representing both the Estate and Vendor Plaintiffs, is seeking the subordination of some claims to other claims.

Salus also argues that Ringstad & Sanders' supervision for conflicts of interest does not cure any conflicts that may arise. In support, Salus points to case law from the Eighth Circuit where the court found that an attorney (whom the chapter 7 trustee sought to employ as special counsel) who held adverse interest could not represent the trustee. The court ultimately concluded that the attorney's representation of the trustee posed an actual conflict regardless of the scope of employment—even if the scope was limited. See *In re M&M Marketing, LLC*, 426 B.R. 796 (8th Cir. 2010).

Salus argues that federal courts should apply California law when dealing with rules that govern the professional conduct of attorneys. According to Salus, the

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CONT... Anna's Linens, Inc. **Chapter 7**

California Supreme Court has held that when an attorney undertakes dual representation, the primary concern is whether the attorney can maintain a duty of loyalty to the clients. Here, Salus argues that Brutzkus Gubner will inevitably breach their duty of loyalty to the Vendor Plaintiffs and Trustee, as Brutzkus Gubner will likely learn confidential information that will later be used against Trustee. Accordingly, because Brutzkus Gubner will breach their duty of loyalty, the firm is *per se* disqualified. In addition, Salus contends that the Conflicts Waiver does not cure Brutzkus Gubner's conflicts of interest because the conflicts that arise here cannot be cured.

D. The Trustee's Reply

The Trustee does not contend that there is no potential conflict, but rather that it is manageable with safeguards built into the agreement. "Concurrent representation of trustee and creditor can be permitted if, and only if, it is within the § 327(c) safe harbor, which requires that other creditors and the U.S. trustee have the opportunity to object. If there is objection, then the court must determine whether an actual conflict of interest exists." *In re Maximus Computers, Inc.*, 278 B.R. 189, 194 (B.A.P. 9th Cir. 2002). Here, the issue of whether Brutzkus Gubner is disinterested hinges on determining the scope of their actual and potential conflicts. Clearly, because Brutzkus Gubner will represent Vendor Plaintiffs in matters against the Estate, and because the Estate has claims against the Vendor Plaintiffs, Brutzkus Gubner would not be disinterested in these matters and could not represent both Trustee and Vendor Plaintiffs. At first glance, this seems sufficient to preclude Brutzkus Gubner from representing Trustee, as 11 U.S.C. 327(a) provides that Trustee "may employ...attorneys that do not hold or represent an interest adverse to the estate..." Although 11 U.S.C. 327(e) permits an exception (stating that the "trustee...may employ... an attorney that has represented the debtor…if such attorney does not represent or hold any interest adverse...to the estate with respect *to the matter on which such attorney is to be employed"* (emphasis added), this Section 327(e) does not appear to be completely applicable here. Brutzkus Gubner does not appear to have previously represented Debtor. Nonetheless, Ninth Circuit case law as cited

above seems to hold that the court need only look to the specific matter when determining if there are conflicts of interest; the court need not look to see if the proposed counsel has an adverse interest at all. But the real question is whether it is possible to completely demarcate where representation as special counsel ends and representation of conflicted interests on behalf of the Vendor Plaintiffs begins, whether the attempts at safeguards offered here are meaningful and/or whether the attempt is even appropriate if the appearance of conflict is so sever as will permeate nonetheless.

D. The Court's View

The court is normally very willing to give trustees wide berth in employment proposals on the precept that usually the trustee is closer to the issues and more attuned to the financial concerns of running litigation, particularly risky litigation that may not be of obvious value net of costs involved. And this is especially so where (as here) the practical alternative may be that no litigation is pursued at all, dooming the case to small potatoes status or administrative insolvency.

But this one pushes the limits allowed in the Bankruptcy Code in a disturbing way on a number of fronts. The court's concerns include:

- Do we (should we) look only to the Adversary Proceeding before us to determine if there is an actual conflict of interest? Trustee is requesting Brutzkus Gubner to be employed as special co-litigation counsel under a relaxed §327(c) standard.

- Are "potential" (as opposed to actual) conflicts of interest sufficient to preclude employment? (The plain language of §327(c) seems to answer this question with "no") On the other hand, stepping into a busy highway on the strength of "no problems so far" statement is hardly a reasonable approach.

- Do the other matters necessarily create actual conflicts of interest in this Adversary Proceeding? ('Other matters' include Vendor Plaintiffs' proofs of claim against Debtor, and Debtor's potential preference action against

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CONT... Anna's Linens, Inc. **Chapter 7**
Vendor Plaintiffs)

- If there is indeed an actual conflict, or one develops, does Ringstad & Sanders' supervision of Brutzkus Gubner cure the conflict? To really understand what is going on and to guard effectively wouldn't that take so much time and effort as to raise the question of why joint representation is any advantage in the first place?

- If the previous question is a close one, is the Joint Prosecution Agreement nevertheless in the best interest of the estate which otherwise lacks the resources to pursue the matter?

- Are the fees to be awarded to Brutzkus Gubner excessive, thus harming the estate creating an actual conflict of interest? The payment provisions do seem exceedingly generous, and are not entirely clear. Of particular concern is the provision suggesting that the Trustee write an estate check for $30,000? Bankruptcy estates advancing costs in cash is very unusual in the court's experience. Up to a 60% recovery in fees strikes the court as at least unusual.

- Some Joint Prosecution Agreement provisions invite closer scrutiny. The claims that the Trustee on behalf of the estate and Vendor Plaintiffs have against one another are proposed to be held "in abeyance" and pursued after this Adversary Proceeding. What happens if it develops that the recovery against the Vendor Plaintiffs would be an easy mark, but the case against Salus proves very difficult? Is the Trustee obliged to wait until all appeals are exhausted, for example, to sue the Vendor Plaintiffs? Will this color the advice of special litigation counsel, Brutzkus Gubner?

- If Trustee and Vendor Plaintiffs inadvertently disclose information, the confidential information "will not be used against the other party." How, exactly, do we enforce that? And how do we in practical terms unlearn that which we might have learned? Or how can we practically determine the source of the knowledge in order to invoke this clause?

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CONT... Anna's Linens, Inc. **Chapter 7**

• If Trustee decides to settle after six months, Vendor Plaintiffs will still be permitted to prosecute their claims. But does not this create its own conflict? Will not Salus be less willing to settle in a decent amount or at all if the lawsuit must still drag on as to the other half? Is not the practical effect of this provision that the last settling party gets to dictate the terms?

• The court strongly doubts that the provision involving §326 is enforceable. The court is not inclined to allow parties to dictate how the "handle" will be determined through contract if to do so violates the statutory limitation.

No tentative. The court will hear argument.

Party Information

Debtor(s):

Anna's Linens, Inc. — Represented By
David B Golubchik
Lindsey L Smith
Eve H Karasik
John-Patrick M Fritz
Todd M Arnold
Ian Landsberg
Juliet Y Oh
Jeffrey S Kwong

Trustee(s):

Karen S Naylor (TR) — Represented By

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, December 06, 2016 **Hearing Room 5B**

11:00 AM

CONT... Anna's Linens, Inc. **Chapter 7**

Nanette D Sanders
Brian R Nelson
James C Bastian Jr
Melissa Davis Lowe
Steven T Gubner
Jason B Komorsky

2:00 PM
8:15-12496 Jana W. Olson **Chapter 7**

#7.00 Chapter 7 Trustee's Motion for Order Requiring Disgorgement of Funds Pursuant to 11 U.S.C. Section 329 and FRBP 2016 and 2017 and Turn Over of Estate Property Under Section 542
(cont'd from 9-22-16 per order granting mtn to cont. hrg entered 9-19-16)

Docket 433

Tentative Ruling:

This is the Trustee's motion for turnover of documents under §542 and certain monies under either §§542 or 327 from attorney Wayne Philips. The motion relates to two general categories of property, documents previously requested by the Trustee (and already ordered delivered by the court) and monies. The court considers the categories separately:

1. Documents

There really should not be much to debate here. The court has already ordered that *all* documents and materials not strictly categorized as attorney –client communications must be turned over. But Ms. Olson has waived the privilege, so that would seem to now mean **everything** must be turned over, no exceptions. Mr. Phillips claims that he has indeed complied and everything is turned over, but he now adds that some items may have been deleted because, as he now claims, his agreement with Ms. Olson relieved him of any requirement to otherwise maintain a file. He maintains that the Trustee now has everything that exists including some later agreements pertaining to amendments to the fee arrangement. If this is true the court is unclear what the Trustee would have the court do. Either something more exists or it doesn't. If it exists it must be turned over. Period. Full stop. The court will not indulge in assumptions or inferences here. About the only thing that makes any sense at this point, and assuming accuracy of the testimony of the parties, is to require that Mr. Phillips make his computer drives available for a forensic analysis to see if any deleted items can be reconstructed. There is some precedent for such an order. *In re Schick*, 215 B.R. 4, 8 (Bankr. S.D.N.Y. 1997). Of course, there will need to be protocols created such that the privacy of non-Olson related matters is not compromised. Accommodations so as not to disrupt Mr. Phillips' practice must also be observed. And the estate will have to pay the cost. But the Trustee is entitled to exhaust every *reasonable* avenue in obtaining information that

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CONT... Jana W. Olson **Chapter 7**

might facilitate estate administration.

2. Monies

The Trustee has identified the sum of $60,710.61 he contends must be turned over (or disgorged in less polite terms). This sum is comprised of three parts:

a. $21,919.61—this amount is alleged to be "an unearned retainer" and is therefore property of the estate

b. $6,755.00—this amount was paid pre-petition to Philips for services in contemplation of Debtor's bankruptcy estate. These services provided no benefit to the Estate in the Trustee's view.

c. $32,036—this amount is comprised of two post-petition payments that were not initially disclosed nor approved. These payments were made with funds allegedly from the estate and should therefore be disgorged.

In the alternative, (and somewhat confusingly) the sum of $74,036 should be disgorged, as this is the total amount of compensation Philips disclosed as having received from Debtor in relation to the services he performed.

The court will start with the $32,036 received post-petition. The main problem here is that there is a complete failure of proof. No one (at least none the court has seen) has pinpointed the source of these funds. There is a vague reference to proceeds of a post-petition loan from one or more doctors. But details on the who, what, when and how are conspicuously lacking. The Trustee strongly suggests that this might have been a draw from the Pink Panther Trust, but there is apparently no evidence of this. The Trustee also suggests this represents monies hidden by the Debtor, much like the gold bars and jewelry, or the funds in her purse the day of her incarceration. The problem is that the court does not indulge in vague inferences. It operates on evidence. The Trustee bears the burden on this point and has not carried that burden. The Trustee will have to prove a property of the estate characterization before he will obtain the equivalent of a $32,036 judgment.

Next, the court considers the $21,919.61 characterized as an "unearned retainer." Mr. Phillips says his arrangement was not an earned upon receipt retainer but rather purchase of "credits" for work to be done in future. See Exhibit "3." The only law cited to the court

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CONT... Jana W. Olson **Chapter 7**

suggests that under California law earned upon receipt retainers are only valid if they relate to reservation of availability for a time certain; the Trustee argues this fails here because there is no end time limit mentioned. Well, maybe. But the court is hesitant on this record to find that California law, which provides generally that the attorneys and clients are free to strike their own agreement, is not adhered to here such that the court can freely disregard the "agreement" as illusory and require turnover.

Lastly, the court considers the $6755 which is reportedly the sum of all the time entries mentioning "bankruptcy." Mr. Phillips argues that mere reference to the single word is hardly sufficient to determine that these are, in fact, of the sort the must regard under §329 "for services rendered or to be rendered in contemplation of or in connection with the case…" He offers benign characterizations that these had to do with matters only tangentially related to the eventual filing of a Chapter 7 petition which was actually handled by Mr. Polis. But the court notes that the language of the statute is sufficiently elastic to reach all of the items by use of "in connection with…" The Trustee's real problem is that the statute goes on to require in subsection (b) that the court determine whether the amount exceeds the reasonable value of any such services. This is difficult to do on this record. Obviously there was (or should have been) a lot more involved than merely filling out the petition and schedules. There was, or should have been, consultations of the pros and cons involved in committing to a potentially irreversible petition, particularly one that might not result in a discharge in view of the off shore trusts. Whether any of that happened is just not clear, and it is even harder to evaluate the "reasonableness." In sum, the attorney may bear the burden here (because the applicant bears the burned of reasonableness in allowance motions). See e.g. *In r e Xebec*, 147 B.R. 518, 524 (9th Cir BAP 1992); see also *In re Velazquez*, 2009 WL 9087268, at *2 (Bankr. E.D. Cal. Aug. 14, 2009)(citing *In re Jastrem*, 253 F.3d 438, 443(9th Cir. 2001)). But the court is not inclined to order disgorgement without some better showing that these were unreasonable.

Deny

Party Information

Debtor(s):

Jana W. Olson Pro Se

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, December 06, 2016 **Hearing Room 5B**

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CONT... Jana W. Olson **Chapter 7**

Trustee(s):

Richard A Marshack (TR)	Represented By Sarah Cate Hays D Edward Hays Ashley M Teesdale

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, December 06, 2016 **Hearing Room 5B**

2:00 PM

8:15-12496 Jana W. Olson **Chapter 7**

#8.00 Verified Motion For Day Release Of Jana Olson
(OST Signed 11-29-16)

Docket 468

Tentative Ruling:

No tentative.

Party Information

Debtor(s):

Jana W. Olson — Represented By
Wayne Philips

Trustee(s):

Richard A Marshack (TR) — Represented By
Sarah Cate Hays
D Edward Hays
Ashley M Teesdale

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, December 06, 2016 **Hearing Room 5B**

2:00 PM

8:15-12496 Jana W. Olson **Chapter 7**

#9.00 Motion To Set Aside Re: Motion For Summary Judgment And/Or Appeal Of The Motion For Summary Judgment And Why She Should Not Be In Civil Contempt Of Court
(OST Signed 11-29-16)

Docket 480

Tentative Ruling:

No tentative.

Party Information

Debtor(s):

Jana W. Olson — Represented By
Wayne Philips

Trustee(s):

Richard A Marshack (TR) — Represented By
Sarah Cate Hays
D Edward Hays
Ashley M Teesdale